82-1544

No. _____

In The
Supreme Court of the United States

OCTOBER TERM: 1982

In The Matter Of
FIRST COLONIAL CORPORATION OF AMERICA.

FIRST COLONIAL CORPORATION OF AMERICA,
Petitioner-Appellant,
v.
AMERICAN BENEFIT LIFE INSURANCE COMPANY,
Defendant-Appellee.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Petition of
FIRST COLONIAL CORPORATION OF AMERICA,
Petitioner-Appellant,
for a Writ of Certiorari.

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
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for a Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

(1) Where a Louisiana state court is *totally without jurisdiction* over a Delaware corporation, does it have authority to appoint a "temporary" receiver for that corporation on the *ex parte* application of one purporting to be a stockholder thereof, where such corporation has had neither activities, agents, officers, nor employees

thereof within said state, for more than 10 years, and when *no valid service* could be made on the corporation relative to necessary trial for procurance of a permanent "receiver"?

(2) When *United States Fidelity & Guaranty Co. v. Bray*, supra, mandates that a United States District Court of Bankruptcy is "not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal" (32 S. Ct. 620, *625*), can such Court nevertheless surrender its jurisdiction to a *state* court?

It is believed that 28 USCA 1254, 28 USCA 2101, and to whatever extent necessary, 28 USCA 1651, confer jurisdiction on this Court to review the judgement or decree in question by Writ of Certiorari. RULE 21 of the Supreme Court appears to govern.

TABLE OF CONTENTS

CERTIFICATE OF SERVICE

I certify under Rule 28.5. that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Petition for Certiorari to MR. FLOYD J. FALCON, JR., Attorney, Avant & Falcon, P. O. Box 2667, Baton Rouge, Louisiana 70821, who is counsel of record for American Benefit Life Insurance Company, as required by Rule 28.3.

I further certify under Rule 28.5. that all parties to this proceeding required to be served have thus been served, and that other than AMERICAN BENEFIT LIFE INSURANCE COMPANY AND PETITIONER, there are no other parties to this proceeding.

BATON ROUGE, Louisiana, March 16, 1983.

/s/ FRANZ JOSEPH BADDOCK

TABLE OF AUTHORITIES

A) Cases where, on Certiorari, decisions of Courts of Appeals have been summarily REVERSED by the Supreme Court

B) (1) Cases where, on Certiorari, the Supreme Court has summarily VACATED judgments of the United States Court of Appeals for the Fifth Circuit

B) (2) Cases where, on Certiorari, the Supreme Court has summarily VACATED judgments of United States Courts of Appeals other than the Fifth Circuit

Additional Authorities

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STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment sought to be reviewed by this Court was entered on *December 6, 1982* (first item in Appendix) and *rehearing* was denied on *January 7, 1983* (second item in Appendix). Jurisdiction to review the judgment is afforded this Court by virtue of 28 USCA 1254, 28 USCA 2101, and to whatever extent necessary, 28 USCA 1651. RULE 21 of the Supreme Court appears to govern.

Jurisdiction of this Court is invoked because of the importance of this matter in the field of Bankruptcy Administration, plus the fact that the United States Court of Appeals for the Fifth Circuit has decided this matter directly in conflict with not only a decision of long standing in the same Circuit (*Berl v. Crutcher*, supra), but with a decision of the United States Supreme Court (*United States Fidelity & Guaranty Co. v. Bray*, supra). By thus departing from the accepted and usual course of judicial proceedings, the Court of Appeals has estab-

lished a decision *entirely without precedent*—so much so that intensive research has failed to provide one single case on comparable facts!

> The assertion in the judgment that
>
> "Irrespective of whether American Benefit Life Insurance Company owns five hundred thousand shares of First Colonial Corporation *or whether it owns one share makes no difference whatsoever.*" (underscore ours)

in reference to the surplus of $239,000.00 plus other assets in this case, is apt to spawn a welter of "one share" owners seeking appointment of a "temporary" receiver from a *state* court to receive or administer any surplus which may evolve in *other* bankruptcy cases. Any doubt on this is dispelled by reference to activities of this nature which occurred in *Berl v. Crutcher*, supra, and which are vividly described in the opinion! *Berl*, however, was announced over 50 years ago! What will the situation be in this day when corporate giants such as Manville, Braniff, Wickes, and others, have sought and are seeking protection under the present Act?

The judgment appealed from enables any sharpster to procure "one share" of stock of a corporation involved in any proceeding under the Bankruptcy Act, and on the basis thereof, *request appointment of a "temporary" receiver to handle any residue, from any state court, irrespective of whether that state court has jurisdiction over the corporation or not!*

Indeed one may ask in reference to the present case, would it have made any difference if the "temporary" receiver had been appointed by a state court in

Texas?—or Florida?—or California? Indeed would it have made any difference if the "temporary" receiver had been appointed by a court in the Cayman Islands?

THE STATUTES INVOLVED

The statutes involved herein are substantially the same as those cited in the Table of Authorities, namely: Sec. 2 of the Bankruptcy Act (former 11 U.S.C. 11) as well as 28 USCA 1291, 28 USCA 1334, 28 USCA 1391(c), 28 USCA 1254, 28 USCA 2101, 28 USCA 1651, LOUISIANA REVISED STATUTES 12:151, LOUISIANA CODE OF CIVIL PROCEDURE, Articles 1261/1262, as well as RULE 66 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Most of the factual background necessary for this Court to understand this matter appears in 1) the judgment appealed from (in Appendix) and the predecessor case of *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), cert. denied, 431 U.S. 904, 97 S. Ct. 1696, 52 L. Ed.2d 388 (1977). In addition thereto, the following facts may prove helpful:

FIRST COLONIAL CORP. OF AMERICA is, or was, a Delaware corporation. Its stock was registered with the Securities And Exchange Commission. Previously, it was qualified to do business in Louisiana.

In early 1970 an involuntary petition in bankruptcy was filed against it, in the United States District Court for the then Eastern District of Louisiana, Baton Rouge Division, but what is now the Middle District of Louisiana.

Soon after filing and service of the involuntary petition on its Louisiana Registered Agent, the latter resigned (See: Appendix)! On September 8, 1970 it was adjudged bankrupt and on November 8, 1971 the Secretary of State of Louisiana disqualified it from continuing business within Louisiana. *Since the latter date it has had neither activities, agents, officers, nor employees within the State of Louisiana.*

When the involuntary petition was filed, the Boards of Directors and Officers of FIRST COLONIAL CORP. OF AMERICA were identical with those of ALABAMA NATIONAL LIFE INSURANCE COMPANY, and the latter held the "controlling" stock in the former. This ownership of stock was accompanied by a "looting" of assets to such a degree that a Federal Court in Alabama, and later a Reorganization Court in Arizona, awarded First Colonial approximately $65,000.00 in damages. *Following this "looting" of assets, the Officers and Directors of FIRST COLONIAL CORP. OF AMERICA* abandoned the corporation!

As pointed out in the *Dec. 6, 1982,* Decree of the Fifth Circuit, Note 3., "American Benefit" acquired its stock in "First Colonial" from the receiver of "Alabama National" in connection with a reinsurance agreement dated *March 30, 1970!* Suffice to say that the validity of this transfer was never ruled upon by the United States District Court of Bankruptcy handling the affairs of "First Colonial" since that court ordered trustee to *abandon* plenary litigation against American Benefit Life Insurance Company, and others. It is not known whether the validity of this transfer has been decreed in any other contested proceeding.

On the basis of its alleged ownership of stock, American Benefit Life Insurance Company made an *ex parte* application to a Louisiana state court in New Orleans, for appointment of a "temporary" receiver. This "temporary" receiver was held to have *lack of standing* by the Fifth Circuit!

Later, "American Benefit" made *another* application *ex parte* for the appointment of a "temporary" receiver for FIRST COLONIAL CORP. OF AMERICA, this time to the Louisiana state court in Baton Rouge! As pointed out in argument, it is inconceivable that this court could have jurisdiction over FIRST COLONIAL CORP. OF AMERICA, and when the bankruptcy court ordered transfer of the residue to this "temporary" receiver, trustee appealed!

Before the appeal was terminated, the bankruptcy court, on December 13th 1982, ordered the bankruptcy case closed and trustee discharged. No order revoked prior appointment of the Attorney to represent FIRST COLONIAL CORP. OF AMERICA, and on the basis thereof, this Petition for Certiorari was filed. Irrespective thereof, it is believed that the language of *Mosser v. Darrow*, supra, (71 S. Ct. 680 at page *682)* would preclude interference with the absolute right of FIRST COLONIAL CORP. OF AMERICA to seek a Petition for Certiorari from the Supreme Court!

In the United States District Court, "American Benefit" filed a motion to remove District Judge ROBERT COLLINS, and one of the affidavits filed in connection therewith disclosed the identity of the "controlling person" of American Benefit Life Insurance

Company! This identity is confirmed in *Roussel v. Tidelands Capital Corporation*, supra, 438 F. Supp 684, *687-692*, as well as *Professional Investors Life Ins. Co. v. Roussel*, supra, 445 F. Supp 687, *690-691!* Whether the "affidavit" filed by American Benefit Life Insurance Company in this case bears any resemblance or relationship to the fact pattern detailed in *Roussel v. Tidelands Capital Corporation*, supra, 438 F. Supp 684, *689-692*, has not been determined.

BASIS FOR FEDERAL JURISDICTION

In the court of first instance, an involuntary petition in bankruptcy was filed against FIRST COLONIAL CORP. OF AMERICA under Sec. 59(b) of the Bankruptcy Act (former 11 U.S.C. 95(b)). This proceeding was before the Referee, and it is from the Order of the Referee that one Appeal is taken.

The other proceeding in the court of first instance was the one by trustee for the appointment of a RECEIVER for FIRST COLONIAL CORP. OF AMERICA. This was filed in the United States District Court of Bankruptcy (and thus not before the Referee) and it is from a judgment dismissing this application, that an Appeal was filed.

In the latter proceeding, in addition to the jurisdiction of the United States District Court of Bankruptcy, jurisdiction of the matter was asserted also under Sections 1331, 1332, 1334, and 1335 of Title 28 U.S.C. as well as the Securities Act of 1933 and the Securities Exchange Act of 1934, including the Rules and Regulations under those Acts, especially RULE 10b. Pendent

jurisdiction was also asserted under *United Mine Workers of America v. Gibbs* (1966) 383 U.S. 715, 86 S. Ct. 1130, *1138.* Procedural jurisdiction was asserted under RULES 64, 65, 66, and 67 of the Federal Rules of Civil Procedure.

ARGUMENT AMPLIFYING REASONS RELIED UPON FOR ALLOWANCE OF WRIT

As stated in *Professional Investors Life Ins. Co. v. Roussel,* supra, 445 F. Supp. 687, *697:*

> "*International Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, requires that the contact be "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "

Thus, on the basis of *International Shoe Co. v. Washington,* supra, as well as *Pure Oil Co. v. Suarez,* supra, and including 28 USCA 1391(c), it appears to border on the farcical to contend that any Louisiana state court had "jurisdiction" over FIRST COLONIAL CORP. OF AMERICA.

Under the law of Louisiana, a full *receiver* can be appointed only *after trial!* LRS 12:151. While it is true that sub-section C. of this provision provides:

> "C. The court may, *ex parte,* pending trial (1) appoint a temporary receiver WHOSE AUTHORITY SHALL CEASE UPON APPOINTMENT OF A RECEIVER AFTER TRIAL or upon dismissal of the proceeding, . . ." (Caps ours)

this provision clearly implies that such "temporary" receiver is to be appointed only in the cases where the court does in fact have jurisdiction to appoint a RECEIVER AFTER TRIAL!

Articles 1261/1262 of the Louisiana Code of Civil Procedure would require service of citation on FIRST COLONIAL CORP. OF AMERICA, through its agent for service of process, or any officer, director, or employee thereof, on any action seeking appointment of a receiver. In default thereof, service may be made on the Secretary of State. However, it stretches reason to conceive how service could be made on a Secretary of State when his office had, 10 years earlier, deemed FIRST COLONIAL CORP. OF AMERICA as no longer having corporate existence. (see: Items #4 and #5 in Appendix)

When "American Benefit" procured appointment of "temporary" receiver Fournet, it could never convert "temporary" receiver Fournet into a full receiver because it was impossible to have any TRIAL—because service of process was impossible. In all this time after procuring another "temporary" receiver, "American Benefit" could never convert "temporary" receiver ZITO into a full receiver, for the same reason. His designation in sections of the opinion as a "receiver" is obviously in error! By what mystery another *state* court could possibly entertain TRIAL after service of process, is not known! Suffice to say that *both* proceedings were instituted by "American Benefit" *ex parte*, and the trustee for FIRST COLONIAL CORP. OF AMERICA was *NOT* made a Party to either proceeding!

More specifically, it destroys the great principles of equity enunciated in such cases as *Young v. Higbee*, supra, *Prudence Realization Corp. v. Geist*, supra, *S.E.C. v. U. S. Realty*, supra, *Pepper v. Litton*, supra, *Heiser v. Woodruff*, supra, and *Bank of Marin v. England*, supra to deem that, in reality, any valid service

on FIRST COLONIAL CORP. OF AMERICA could be had, or that such corporation had any agent, officer, director, employee, or activities in Louisiana for this past decade!

The most powerful arguments are those derived from *United States Fidelity & Guaranty Company v. Bray*, supra, and *Berl v. Crutcher*, supra. It is difficult to perceive how Certiorari could be denied, IF the rules of these cases are still the law of the land!

In *Bray*, after the bankruptcy trustee carried all the contracts to completion, and in fact almost completed the bankruptcy administration, there remained *about $27,600.00* for distribution and the bankruptcy court authorized the filing of a suit in another Federal Court to determine disposition of the proceeds. On Appeal, this decision was REVERSED by the Court of Appeals, which reversal was AFFIRMED by the Supreme Court.

The language of the latter is a classic!

32 S. Ct.
624-625:

> "Section 2 of the bankruptcy act invests courts of bankruptcy "with such jurisdiction *at law and in equity* as will enable them to exercise original jurisdiction in *bankruptcy proceedings*, . . . to
>
> . . . . . .
>
> (7) "Cause the estates of bankrupts to be collected, reduced to money and distributed,
>
> (15) "Make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act." . . .

> And the section concludes by saying: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."
>
> *****
>
> *We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts. . . "*
>
> (underscore ours)

32 S. Ct. *625:*

> "OF THE FACT THAT THE SUIT WAS BEGUN IN THE CIRCUIT COURT WITH THE EXPRESS LEAVE OF THE COURT OF BANKRUPTCY IT SUFFICES TO SAY THAT THE LATTER WAS NOT AT LIBERTY TO SURRENDER ITS EXCLUSIVE CONTROL OVER MATTERS OF ADMINISTRATION, OR TO CONFIDE THEM TO ANOTHER TRIBUNAL." (Caps ours)

In spite of the fact that *Bray* was extensively cited to the Fifth Circuit, that Court does not even mention or distinguish the application of its rule, when $239,000.00 plus other assets are ordered to be turned over to a "temporary" receiver!

Berl v. Crutcher, supra, is even more emphatic! There, after closing and termination of a bankruptcy proceeding, certain oil producing lands became a valuable asset not previously recognized! In spawning several *state* court proceedings for appointment of "receivers" to take over these assets, *the Fifth Circuit Court of Appeals mandated that the United States Dis-*

trict Court of Bankruptcy having jurisdiction over the bankruptcy of the particular corporate bankrupt, HAD THE JURISDICTION TO APPOINT A RECEIVER TO TAKE OVER AFTER COMPLETE TERMINATION OF THE BANKRUPTCY! Indeed this was why trustee filed his action for appointment of a RECEIVER, in the instant case, in the United States District Court since it had unquestioned jurisdiction over the bankruptcy of FIRST COLONIAL CORP. OF AMERICA! But for reasons unknown, both *Bray* and *Berl* are nullified! When *Berl* states (60 F2d 440 at pages 444/445):

> "(13, 14) The contention that prior receivership proceedings are pending in a state court of Texas of competent jurisdiction is easily disposed of. On the face of the papers, the proceeding in which the receiver was appointed was collusive. . . .
>
> . . . . . .
>
> (15) *It is apparent that the door is wide open for the entrance of fraud, and the strong arm of a court of equity is required to preserve the property for its true owners and to do justice to all parties in interest.*" (underscore ours)

is such warning inapplicable in the case of FIRST COLONIAL CORP. OF AMERICA? Further, when *Berl* states (Page 444):

> " . . . *the returning of the surplus is a proceeding in bankruptcy.*" (underscore ours)
>
> . . . . . .
>
> (10-12) In the performance of its duty to turn the surplus over to the bankrupt, it was necessary for the District Court to determine who are the stockholders."

might FIRST COLONIAL CORP. OF AMERICA in-

quire: What court has NOW been assigned this task? Is it such a court sanctioned by Congress to handle this matter under Sec. 2 of the Bankruptcy Act?

We respectfully submit the answers are obvious!

CONCLUSION AND PRAYER

Petitioner prays:

(1) That Certiorari be granted and the judgment in Nos. 82-3222, 82-3223 be summarily REVERSED on the authorities of *International Shoe Co. v. State of Washington*, supra, *Pure Oil Co. v. Suarez*, supra, *United States Fidelity & Guaranty Co. v. Bray*, supra, *Berl v. Crutcher*, supra, 28 USCA 1334, 28 USCA 1391(c), Sec. 2 of the Bankruptcy Act, and Rule 66 of the Federal Rules of Civil Procedure, with directions to remand the cases to the United States District Court for appointment of a RECEIVER for FIRST COLONIAL CORP. OF AMERICA—in accordance with the precedents listed in A) of the foregoing Table of Authorities.

(2) ALTERNATIVELY, that Certiorari be granted and the same judgment be summarily VACATED with directions to remand the cases to the United States District Court for consideration of the same authorities listed in (1)—in accordance with the precedents listed in B) of the same Table.

(3) IN THE FURTHER ALTERNATIVE that the Supreme Court is convinced, after evaluation of the same authorities in (1), that the interests of the shareholders in FIRST COLONIAL CORP. OF AMERICA will best be served through a "temporary" receiver, that Certiorari be granted and the same judgment summarily AFFIRMED—in accordance with the precedents listed in C) of the same Table.

(4) And for all other relief including the PRAYER that the Supreme Court not refuse to grant Certiorari, because of the importance of this matter in the field of Bankruptcy Administration.

Respectfully submitted
BY ATTORNEY

/s/ FRANZ JOSEPH BADDOCK
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APPENDIX

In The Matter Of FIRST COLONIAL CORPORATION OF AMERICA.

FIRST COLONIAL CORPORATION OF AMERICA,
Plaintiff-Appellant,

v.

AMERICAN BENEFIT LIFE INSURANCE COMPANY,
Defendant-Appellee.

Nos. 82-3222, 82-3223

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Dec. 6, 1982.

Appeal was taken from orders entered by the United States District Court for the Eastern District Court of Louisiana, Robert F. Collins, J., affirming order of bankruptcy judge directing trustee to deliver residual assets to state-appointed receiver and refusing to appoint federal receiver. The Court of Appeals, Politz, Circuit Judge, held that it was not abuse of discretion for bankruptcy court to direct delivery of defunct debtor corporation's assets remaining after full administration of estate to state receiver rather than to federal receiver.

Affirmed.

1. Federal Courts Key 544

One may not appeal issue upon which one prevailed, absent exceptional circumstances.

2. Federal Courts Key 611

Issues raised for first time on appeal would not be considered absent showing that pure question of law was posed and refusal to entertain such question would result in miscarriage of justice, that interest of substantial justice was at stake, or that there was no opportunity to object to order upon its issuance.

3. Bankruptcy Key 438

Trustee's being sole party empowered to proceed on behalf of bankrupt estate may not be interpreted as bestowing upon trustee exclusive right to champion rights of bankrupt corporation and its shareholders in and to residual assets after administration of estate is complete and final account is submitted.

4. Bankruptcy Key 246

Bankruptcy trustee's authority and responsibility for protecting estate did not extend to dispute over validity of claims of those purporting to own surplus assets after completion of bankruptcy proceeding. Bankr.Act, § 1 et seq., 11 U.S.C. (1976 Ed.) § 1 et seq.; Bankr.Code, § 403(a), 11 U.S.C.A. note prec. § 101.

5. Bankruptcy Key 438

Where debtor is defunct corportation, bankruptcy court may provide for distribution of residue to its shareholders. Bankr.Act, § 1 et seq.; 11 U.S.C. (1976 Ed.) § 1 et seq.; Bankr.Code, § 403(a), 11 U.S.C.A. note prec. § 101.

6. Bankruptcy Key 19

It was not abuse of discretion for bankruptcy court to direct delivery of defunct debtor corporation's assets remaining after full administration of estate to state receiver rather than to federal receiver. Bankr.Act, § 1 et seq.; 11 U.S.C. (1976 Ed.) § 1 et seq.; Bankr.Code, § 403(a), 11 U.S.C.A. note prec. § 101.

7. Bankruptcy Key 19

The submissibility of particular controversy arising in bankruptcy to state court is ordinarily within bankruptcy court's discretion, to be exercised in interests of parties, the estate, and the proceeding.

Franz Joseph Baddock, Baton Rouge, La., for plaintiff-appellant.

Avant & Falcon, Floyd J. Falcon, Jr., Baton Rouge, La., for defendant-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before Chief Judge CLARK, and POLITZ and HIGGINBOTHAM, Circuit Judges.

POLITIZ, Circuit Judge:

Franz Joseph Baddock, trustee in bankruptcy of First Colonial Corporation of America (First Colonial), appeals: (1) the district court's affirmance of an order of the bankruptcy judge[1] directing Baddock to deliver the residual assets of the bankrupt to a receiver appointed

[1] This proceeding is governed by The Bankruptcy Act of 1898, repealed in 1978 and replaced by the current code. *See* 11 U.S.C. § 403(a) (1980).

by a Louisiana court (docket number 82-3222), and (2) the district court's refusal to appoint a federal receiver (docket number 82-3223). Stripped to essentials, the consolidated appeals challenge the turnover of the assets remaining after a full administration of the estate to a state rather than a federal receiver. Finding no error of law, clearly erroneous factual finding, or abuse of discretion in the questioned rulings by the district and bankruptcy courts, we affirm.

Background Facts

First Colonial, incorporated in 1961 under Delaware law, was abandoned by its directors and management and forced into involuntary bankruptcy in June 1970.[2] Shortly thereafter the corporation was adjudicated a bankrupt and Baddock was appointed trustee. American Benefit Life Insurance Company (American Benefit), disputed majority shareholder of First Colonial[3] and appellee in these consolidated appeals, was permitted to intervene in the bankruptcy proceeding in mid-1974. At about that time, the court approved a procedure wherein all timely filed claims were satisfied.

[2] A detailed recital of the early stages of the bankruptcy proceeding may be found in *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977), wherein we disposed of appeals challenging awards of priority fees made to attorneys for the trustee and a petitioning creditor.

[3] American Benefit acquired stock in First Colonial by virtue of a reinsurance agreement with the receiver for Alabama National Life Insurance Company, then in receivership under the supervision of the Circuit Court of Jefferson County, Alabama. This agreement, dated March 30, 1970, provided for the reinsurance of the business of Alabama National. Title to certain assets, including First Colonial stock, was conveyed to American Benefit.

In June of 1974, American Benefit petitioned the state district court in Orleans Parish for appointment of a receiver for First Colonial. The state tribunal appointed Jno. Fournet, retired Chief Justice of the Supreme Court of Louisiana, as temporary receiver under the provisions of La.R.S. 12:151 C. Justice Fournet's involvement was essentially passive and he was never confirmed as receiver under La.R.S. 12:151 A.

The proceedings, complex and cumbersome, unfolded at a leaden pace. Finally, in July of 1980, the bankruptcy judge, Harvey H. Posner, entered the final orders assessing priority fees and declining to reopen the filing period to accommodate creditors who had failed to file their claims timely. Baddock filed a complaint against the Internal Revenue Service and American Benefit seeking, *inter alia*, a clearance and discharge of unliquidated tax liabilities as a prelude to termination of the bankruptcy proceeding. The complaint declared that all claims had been satisfied and, subject to a possible IRS levy, the residue of the estate, upon completion of its administration, would total $220,609.83.

Thereafter the trustee petitioned for conversion of the bankruptcy into a Chapter X reorganization. The bankruptcy judge dismissed this petition because "the estate has already been fully administered as a straight bankruptcy case and full relief has already been accorded said corporation and its creditors," and because the petition did not comply with Chapter X. This ruling was not appealed.

Baddock then challenged the venue of the Fournet receivership proceedings. In response, American Bene-

fit petitioned the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana, for appointment of James J. Zito as temporary receiver. Baddock did not object to this appointment. Once the bankruptcy court absolved First Colonial and Baddock of any further liability for federal tax, Baddock sought the appointment of a federal receiver in the United States District Court for the Middle District of Louisiana. After the two judges in the Middle District recused themselves, the case was transferred to the Eastern District and alloted to Judge Robert F. Collins.

Within a week of moving for appointment of a federal receiver, Baddock filed his final accounting, reflecting a cash and non-cash residue totaling $216,664.49. All parties were given a copy of the report and notified a 15-day period for interposing objections. The bankruptcy judge ultimately approved the report and directed the trustee to deliver the surplus to the bankrupt or its legal representative, whereupon the estate would be closed, the trustee would be discharged and his bond would be canceled.

In January of 1981 American Benefit moved for delivery of the residual assets to James J. Zito, in his capacity as temporary reciever for First Colonial. After a hearing, the bankruptcy judge directed Baddock to surrender to Zito all First Colonial assets upon the judge being satisfied of the sufficiency of the receiver's credentials. Zito was ordered to present his letters of appointment.[4] The trustee appealed this order to the district court.

[4] The record does not reflect compliance with this mandate, although American Benefit has sought to file copies of Zito's oath of

In reviewing the bankruptcy court's order, Judge Collins traced the origins of equity jurisdiction in a bankruptcy setting and concluded that Judge Posner had acted within his discretion in directing the trustee to deliver the surplus assets to the temporary receiver. The district court opined that given the completion of the administrative process, the only issue remaining was the resolution of the identity of the party entitled to receive the assets of First Colonial. See note 4, *supra*. The district court found that the broad discretion accorded the bankruptcy judge extended to directing delivery of the surplus assets to a receiver appointed by a state court. Finally, Judge Collins rejected as untimely the trustee's request for the recusal of the bankruptcy judge.

On the basis of his affirmance of the bankruptcy court's order directing delivery to the state receiver, the district court dismissed the trustee's petition for appointment of a federal receiver. Insofar as the record reflects, the bankruptcy proceedings have not been closed; the trustee has not been discharged.

Issues

[1, 2] Invoking the authority purportedly conferred upon him by this court in a prior appeal, *In re First Colonial Corporation of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977), the trustee challenges both Ameri-

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office and letters issued post-appeal. We are reluctant to enlarge the record to include materials not before the district court. *Kemlon Prods. & Devel. Co. v. United States*, 646 F.2d 223 (5th Cir. 1981) *cert. denied*, 454 U.S. 863, 102 S.Ct. 320, 70 L.Ed.2d 162; 16 Wright & Miller, Federal Practice and Procedure § 3956 (1981 Supp.). This matter remains for resolution by the district court.

can Benefit's standing to seek Judge Posner's recognition of a state court receivership for purposes of preserving the debtor's residual assets and the power of the bankruptcy court to do so. Other issues are raised which were not properly presented or preserved for appeal. *See In re Novack*, 639 F.2d 1274 (5th Cir. 1981); *In re Levens*, 563 F.2d 1223 (5th Cir. 1977).[5]

[3] As we noted in our earlier opinion, the trustee is usually the sole party empowered to proceed on behalf of the bankrupt estate. 544 F.2d at 1297. However, this may not be interpreted as bestowing on a trustee the exclusive right to champion the rights of a bankrupt corporation and its shareholders in and to the residual as-

[5] Our examination of the record discloses that appellant's objections to the power of the Orleans Parish court to exert in personam jurisdiction over First Colonial in the receivership proceeding, and to the refusal to Judges Posner and Collins to recuse themselves were not properly preserved for appeal. The jurisdictional issue was not raised in the bankruptcy court, nor did the debtor, through its trustee, request Judge Posner to disqualify himself. Because the latter contention had not been interposed in the bankruptcy court, the district court declined to entertain it on appeal. Although American Benefit moved for Judge Collins' recusal on the basis of certain intemperate remarks made by a former law clerk, Baddock vigorously opposed the motion on behalf of First Colonial and in fact prevailed on this issue. One may not appeal an issue upon which one prevailed absent exceptional circumstances.

Our rule against considering issues raised for the first time on appeal does not control (1) when a pure question of law is posed and a refusal to entertain such a question results in a miscarriage of justice, (2) where the interest of substantial justice is at stake, or (3) there was no opportunity to object to an order upon its issuance, *In re Novack*, 639 F.2d at 1277. None of these exceptions is implicated under the facts and circumstances of this case. Our review shall therefore be limited to issues properly asserted before the bankruptcy or district courts at the time the orders appealed from were entered.

sets after the administration of the estate is complete and the final account is submitted. *See Berl v. Crutcher*, 60 F.2d 440 (5th Cir.), *cert. denied*, 287 U.S. 670, 53 S.Ct. 314, 77 L.Ed. 578 (1932).

Standing

Baddock argues that: (1) American Benefit may not act for the state receiver; (2) American Benefit's title to the First Colonial stock is fatally flawed; (3) American Benefit may not champion the rights of First Colonial shareholders. Addressing standing, the bankruptcy judge remarked during the hearing on American Benefit's petition for appointment of Zito as custodian of the residual assets:

> American Benefit Life Insurance Company was permitted to intervene generally in this proceeding some five or six years ago, and is a proper party to the proceedings as the Fifth Circuit noted in its opinion in 1977. [544 F.2d at 1297-98.] Irrespective of whether American Benefit Life Insurance Company owns five hundred thousand shares of First Colonial Corporation or whether it owns one share makes no difference whatsoever. It has been determined that it is a proper intervenor and it certainly has the right to suggest to the Court to whom the residual assets should be turned over.

Judge Posner concluded that *sua sponte* he could have ordered the trustee's turnover of any surplus to the debtor; American Benefit's suggestion of this option could not affect that authority.

We previously held that American Benefit, as a shareholder, has a valid interest in the disposition of the residual assets, including, under the circumstances of

this case, appeal of fees awarded to the trustee and others which might diminish the residue. 544 F.2d 1297. We shall not plow that furrow again.

[4] Baddock maintains that he was misinformed about deficiencies in American Benefit's stock ownership claim. He has no cognizable interest in that matter at this stage. The trustee's authority and responsibility for protecting the estate does not extend to a dispute over the validity of the claims of those purporting to own the surplus assets after completion of the bankruptcy proceeding.

Disposition of Surplus

There is no question that the estate has been fully administered and the debtor is entitled to receive the remaining assets. Thus we perceive as the sole issue the identification of the proper person to take possession of the surplus assets in light of the abandonment of the bankrupt corporation by its directors and officers.

[5] Section 2(a) of the Bankruptcy Act, 11 U.S.C. § 11(a), invests the bankruptcy courts with "jurisdiction in equity," a codification of a jurisprudential rule. *See Bank of Marin v. England*, 385 U.S. 99, 87 S.Ct. 274, 17 L.Ed.2d 197 (1966); *In re Miller*, 485 F.2d 74 (5th Cir. 1973). Bankruptcy courts traditionally have been guided by precepts of equity in those areas falling within the interstices of the Act; one such area being the proper disposition of the surplus. In the absence of an express provision for the orderly devolution of surplus monies or other assets after payment of all debts and administrative costs, the courts have relied upon equitable principles in returning such surplus to the debtor. *Time Oil*

Co. v. Wolverton, 491 F.2d 361 (9th Cir.) *cert. denied*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1974); *Hendrie v. Lowmaster*, 152 F.2d 83 (6th Cir. 1945); *Burton Coal Co. v. Franklin Coal Co.*, 67 F.2d 796 (8th Cir. 1933); *Wheeling Structural Steel Co. v. Moss*, 62 F.2d 37 (4th Cir. 1932); *Berl v. Crutcher*. Where the debtor is a defunct corporation, the bankruptcy court may provide for distribution of the residue to its shareholders. *Hendrie v. Lowmaster, Berl v. Crutcher; Johnson v. Norris*, 190 F. 459 (5th Cir. 1911), *cert. denied*, 232 U.S. 723, 34 S.Ct. 479, 58 L.Ed. 815 (1914). *See generally* 6 Remington, Bankruptcy Law, § 2890 (5th ed. 1952).

[6] The bankruptcy court correctly exercised its power to restore the surplus to First Colonial's shareholders. The bankruptcy court properly directed the trustee to deliver the surplus to the state-appointed receiver. As a leading commentator noted:

> . . . it is outside the scope of bankruptcy to go into conflicting claims of stockholders or as to who is entitled to the assets of a dissolved corporation, and, in such instances, the bankruptcy court may simply hold the assets or provide for their custody pending determination of rights by another tribunal.

6 Remington, § 2890 at 510. *Accord, Berl v. Crutcher*, 60 F.2d at 444.

[7] The submissibility of a particular controversy arising in bankruptcy to a state court is ordinarily within the bankruptcy court's discretion, to be exercised in the interests of the parties, the estate and the proceeding. 1 Collier on Bankruptcy, #2.07 at 166 (14th ed. 1974).

There was no danger of conflict between the paramount jurisdiction of the bankruptcy court and that of the courts of Louisiana, inasmuch as the trustee's official duties had been fulfilled and the administration of the estate was completed. The district court carefully considered the welfare of the debtor and its shareholders, together with the Act's underlying policy of efficient and expeditious settlement of proceedings in bankruptcy, in affirming the bankruptcy court's order. The court likewise, on this basis, properly dismissed the petition for a federal receiver.

The judgment of the district court, in each case, is, in all respects, AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 82-3222 & 82-3223

FIRST COLONIAL CORPORATION OF AMERICA,
Plaintiff-Appellant,

VERSUS

AMERICAN BENEFIT LIFE INSURANCE COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 6, 1982, 5 Cir., 198__, _____ F.2d_____).

(JANUARY 7, 1983)

Before CLARK, Chief Judge, POLITZ and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

/s/ HENRY A. POLITZ

UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nos. 82-3222 & 82-3223

IN THE MATTER OF:
FIRST COLONIAL CORPORATION OF AMERICA,
FIRST COLONIAL CORPORATION OF AMERICA,
Plaintiff-Appellant,

VERSUS

AMERICAN BENEFIT LIFE IINSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ORDER:

The motion of APPELLANT for ☑ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

/s/ HENRY A. POLITZ

UNITED STATES
CIRCUIT JUDGE

UNITED STATES OF AMERICA

State of Louisiana

James H. "Jim" Brown
SECRETARY OF STATE

I, Secretary of State, of the State of Louisiana, I do hereby Certify that

FIRST COLONIAL CORP. OF AMERICA,

A Delaware corporation domiciled at Wilmington,

Filed charter and qualified to do business in this State on November 10, 1964.

I further certify that the records of this Office indicate that the corporation's authority to transact business in Louisiana was revoked under the provisions of R.S. 1950, 12:303 on November 8, 1971.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on,
November 13, 1980

Jim Brown
Secretary of State

STATE OF LOUISIANA
UNION · JUSTICE · CONFIDENCE
SECRETARY OF STATE

UNITED STATES OF AMERICA

State of Louisiana

James H. "Jim" Brown
SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that

FIRST COLONIAL CORP. OF AMERICA,

A Delaware corporation domiciled at Wilmington,

Filed charter and qualified to do business in this State on November 10, 1964.

I further certify that the records of this Office indicate that C T Corporation System was appointed as agent on November 10, 1964 and resigned on August 10, 1970.

I further certify that the corporation was revoked on November 8, 1971 in accordance with R.S. 12:313.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on,
January 25, 1983

Jim Brown

Secretary of State

STATE OF LOUISIANA · UNION · JUSTICE · CONFIDENCE · SECRETARY OF STATE

No. 82-1544

In The
Supreme Court of the United States

OCTOBER TERM: 1982

In The Matter Of
FIRST COLONIAL CORPORATION OF AMERICA

FIRST COLONIAL CORPORATION OF AMERICA,
Petitioner,

v.

AMERICAN BENEFIT LIFE INSURANCE COMPANY,
Defendant.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Supplemental Appendix

of

First Colonial Corporation of America

Respectfully submitted
BY ATTORNEY

FRANZ JOSEPH BADDOCK
P. O. Box 3573
Baton Rouge, Louisiana
70821
(Tel.: (504) 343-9194)

SUPPLEMENTAL APPENDIX

(As requested by the Clerk's Office of the Supreme Court of the United States, this Supplemental Appendix includes the Opinions and Decrees of the United States District Court for the Eastern District of Louisiana, from which Decrees Appeals were taken to the United States Court of Appeals for the Fifth Circuit.)

NOTE: Since the last page of the Appendix in the Petition for Certiorari is Page 30, the Page Numbers in this Supplemental Appendix begin with Page No. 31.

MINUTE ENTRY
MARCH 3, 1982
COLLINS, J.

CIVIL ACTION

IN THE MATTER OF:
FIRST COLONIAL CORPORATION OF AMERICA

NO. 81-409

SECTION "C"

MARCH 12, 1982

* * * * * * * * * * * * * * * *

This matter is before the court on the petition of Franz J. Baddock, Esq., Trustee in Bankruptcy of First Colonial Corporation of America ("First Colonial"), requesting this court to appoint a Receiver for First Colonial in order to preserve the residue which now exists after the satisfaction of all claims and expenses in the First Colonial bankruptcy proceeding.

WHEREFORE, after due consideration of the arguments of counsel, the submitted memoranda, and the applicable law, the court hereby DENIES Trustee's petition for an appointment of a Receiver by this court.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

REASONS

On December 10, 1980, the Trustee filed a complaint in the United States District Court for the Middle Dis-

trict of Louisiana, seeking the appointment of a Receiver to preserve the residue which now exists after the satisfaction of all claims and expenses in the First Colonial bankruptcy proceeding and to preside over anticipated future litigation involving that residue. The bankruptcy proceeding, Docket No. BK 70-334, was administered by the Bankruptcy Court of the Middle District of Louisiana. A subsequent appeal was filed and passed upon by the Fifth Circuit Court of Appeal. *In the Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977). The Trustee's instant petition seeking appointment of a Receiver was first allotted to Chief Judge Parker of the Middle District of Louisiana. Chief Judge Parker recused himself on the grounds that he had appeared in the past as counsel of record for one of the interested parties. The Trustee's petition was then reallotted to United States District Court Judge Polozola. On December 18, 1980, Judge Polozola signed an interim Order requiring that the residue from the bankruptcy proceedings be preserved in a bank account at the Louisiana National Bank of Baton Rouge, Louisiana. However, on December 29, 1980, by Minute Entry, Judge Polozola recused himself from this matter without assigning reasons. Judge Polozola in the same Minute Entry rescinded his prior Order of December 18, 1980. On January 27, 1981, Chief Judge Parker ordered that this matter be transferred to the Eastern District of Louisiana because both he and Judge Polozola had recused themselves. The case was then transferred to this District and reallotted to this Section of court.

A conference between the court and the Trustee was held on February 5, 1981. At that time, the Trustee

urged the court to appoint a Receiver, as prayed for in the Trustee's petition. The Trustee also informed the court that American Benefit Life Insurance Company, a claimant to the residue, had successfully petitioned the Nineteenth Judicial District Court, for the Parish of East Baton Rouge, to appoint James J. Zito as Temporary Receiver for First Colonial. Further, the Trustee informed the court that on February 3, 1981, Harvey H. Posner, Bankruptcy Judge, Middle District of Louisiana, ordered the Trustee to deliver control of the residue to James J. Zito. The Trustee further informed the court of his intention to appeal Judge Posner's Order of February 3, 1981.

The Trustee appealed Judge Posner's Order of February 3, 1981. On appeal this court, in its Memorandum Opinion of March 4, 1982, determined that the Order directing the Trustee to surrender and deliver the residual assets of the bankrupt estate to the Receiver; close the estate; and be discharged as Trustee, was well within the bankruptcy judge's broad, equitable, discretionary powers. Additionally, this court found that such Order did not manifest clear error to warrant reversal. Consequently, the bankruptcy judge's Order of February 3, 1981 was affirmed.

The above determination mandates that this court dismiss the instant petition. The bankruptcy judge's Order, being upheld by this court on appeal, obligates the Trustee to surrender and deliver the residual assets to the Receiver, close the estate, and be discharged as Trustee. If this court were to grant Trustee's prayer and appoint a second receiver, it would be appointing an offi-

cial whose duties, obligations, and responsibilities would be in direct conflict with those of the duly appointed Temporary Receiver. This would be inconsistent with this court's earlier ruling upholding the bankruptcy judge's recognition and adoption of the state appointed Receiver. In light of its earlier determination, this court fails to see the necessity of appointing a new receiver. Consequently, the instant petition should be dismissed.

This matter is hereby DISMISSED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN RE: FIRST COLONIAL CORPORATION OF AMERICA, Bankrupt

CIVIL ACTION

NO. 81-694

SECTION "C"

MARCH 10, 1982

* * * * * * * * * * * * * * * * *

MEMORANDUM OPINION

Appeal from the United States Bankruptcy Court of the Middle District of Louisiana; Harvey H. Posner, Bankruptcy Judge.

This is an appeal by Franz J. Baddock, the trustee in bankruptcy of First Colonial Corporation of America ("First Colonial"), from the order of the bankruptcy judge directing the trustee to surrender and deliver the residual assets of the estate of First Colonial (the "Estate") to a temporary receiver appointed by the Nineteenth Judicial District Court of the State of Louisiana, close the Estate, and be discharged as trustee. The material facts, stated as briefly as possible, are as follows:

First Colonial was adjudged bankrupt September 8, 1970, on the basis of an involuntary petition filed by the trustee.[1] Because it appeared that First Colonial possessed viable causes of action against several corporations and private individuals, the trustee instituted several plenary suits on behalf of the Estate.

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[1] First Colonial was abandoned by its officers and board of directors in 1969.

After approximately two years of discovery and pretrial maneuvering, the plenary suits were consolidated for trial. On June 28 and July 1, 1974, shortly after the trial had begun, the district court directed the trustee to settle all of the bankrupt's claims for $600,000. Although the trustee and his attorneys strenuously objected, because they believed that a much larger recovery would result if the cases proceeded through trial, the court concluded that further prosecution of the suits would not benefit the creditors and that failure to accept the settlement promptly would delay, and possibly place in jeopardy, receipt by the Estate of an asset sufficient to satisfy all of the claims timely filed by creditors. *Matter of First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). Accordingly, a settlement was entered, pursuant to which all of the creditors of the bankrupt were paid. After payment of all creditors and administration fees, a residual of $216,664.49 cash and certain other relatively insignificant assets remained.

In 1974, the Orleans Civil District Court appointed John B. Fournet, the former Louisiana Supreme Court Chief Justice, as Temporary Receiver for First Colonial. The Fournet receivership was objected to by the trustee on the basis that such receivership was ineffective from its inception because of improper venue. In an effort to appease the trustee and speed the conclusion of the bankruptcy administration, American Benefit Life Insurance Company ("American Benefit"), a disputed shareholder of First Colonial and claimant to the residue, after being permitted to intervene in this matter, procured the appointment of James J. Zito as Temporary

Receiver for First Colonial, in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, a court of proper jurisdiction and venue.

In early January, 1981, American Benefit filed its Motion for Delivery/Surrender of Residual Assets. This motion was filed to precipitate a conclusion of the bankruptcy action. Judge Posner, the bankruptcy judge who has handled this matter from its inception, ordered the trustee to show cause on February 3, 1981, why he should not surrender the residual assets to the Temporary Receiver.

A hearing was had on that afternoon, and the court, after considering the pleadings, the record, and the arguments of counsel, entered the Order of February 3, 1981 (the "Order"). The Order directed Baddock to surrender and deliver the residual assets of the Estate to the Temporary Receiver; close the Estate; and be discharged as trustee. It is from this Order that the present appeal was taken.

DISCUSSION

This court, sitting as a review court in the case at bar, is restricted to the "clearly erroneous" standard of review with respect to the bankruptcy judge's findings and ruling that the trustee should surrender and deliver the residual assets of the estate to the state appointed receiver. The bankruptcy court's factual findings and determination must be affirmed unless clearly erroneous; the test for the reviewing court is not whether a different conclusion from evidence would be appropriate, but whether there is sufficient evidence in the record to prevent clear error in the bankruptcy judge's findings and

determination. *Matter of Baldwell*, 610 F.2d 228 (5th Cir. 1980); *Matter of Boydston*, 520 F.2d 1098 (5th Cir. 1975); *In re Hunt*, 496 F.2d 882 (5th Cir.), *rehearing denied*, 502 F.2d 1167 (1974).

A proceeding in bankruptcy is a proceeding *in rem* against the estate of the debtor. *Straton v. New*, 283 U.S. 318, 321, 51 S.Ct. 465, 75 L.Ed. 1060 (1931). As such, the bankrupt estate is within the jurisdiction of the bankruptcy court which must dispose of the entire estate. "The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in costodia legis* from the filing of the petition." *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307, 32 S.Ct. 96, 99, 56 L.Ed. 208 (1911). On the question of the exclusiveness of the jurisdiction of the bankruptcy court in all "proceedings in bankruptcy" the Supreme Court stated in *United States Fidelity & Guaranty Co. v. Bray*, 225 U.S. 205, 217, 32 S.Ct. 620, 625, 56 L.Ed. 1055 (1912):

> We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.
>
> . . . . . .
>
> A distinct purpose of the bankruptcy act is to sub-

> ject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy.

To accompany the bankruptcy courts' jurisdiction in "all proceedings in bankruptcy," said courts were also given the widest equity powers in such matters by section 2 of the Bankruptcy Act of 1898, 11 U.S.C.A. §11(15). Clause 15 grants them authority to "make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title."

Thus, the bankruptcy court in this matter had exclusive jurisdiction over the property of First Colonial and ancillary jurisdiction to determine any controversy between third parties as to the title and ownership of that property. The bankruptcy court also had authority to bring in all parties necessary for the complete determination of the controversy and the broad equity powers to take such action necessary for the effective administration of the estate. *Berl v. Crutcher,* 60 F.2d 440 (5th Cir.). *cert. denied,* 287 U.S. 670 (1932).

During the latter part of 1980, the trustee filed his Final Accounting and Report. That accounting established that the Estate had been fully administered and all debts paid. A residual of $216,664.49 cash and certain other relatively insignificant assets remained. The disposition of this surplus is the subject of this present dispute.

Except by necessary implication, the Bankruptcy Act, 11 U.S.C.A. §1 *et. seq.*, makes no provision for the disposal of a surplus remaining after payment of the costs of administration and all creditors in full. This is based on the fact that the bankruptcy law and all machinery for carrying it into effect is predicated on insolvency. This was aptly noted by the court in the seminal case *In re Lenox*, 2 F.2d 92 (W.D. Pa. 1924):

> The Bankruptcy Law (Comp. St. §§ 9585-9656) and all machinery for carrying it into effect is predicated on insolvency. As defined in the act, a person is insolvent when the aggregate of his property shall not at a fair valuation be sufficient in amount to pay his debts. Insolvency is a jurisdictional fact, upon which every proceeding in bankruptcy must be based. In a voluntary petition, the bankrupt must make oath of his inability to pay his debts in full, and his willingness to surrender all his property for the benefit of his creditors, except such as is exempt by law. Adjudication follows only on the finding by the court of such fact. In involuntary proceedings, if the alleged bankrupt denies insolvency, the petition will be dismissed on the finding of this fact. In other words, insolvency, inability to pay his debts in full, is the basis of the whole proceeding, and the act of Congress in all its provisions has reference to that situation. The equitable distribution of all the insolvent's property among his creditors is the end and purpose of the law. The act did not contemplate, and therefore did not provide for the disposition of, a balance in the hands of the trustee after the payment of creditors in full. In such a situation, where in fact all the creditors are paid in full, every principle of equity would require the payment of such balance to the bankrupt, not because of any provision in the

> Bankruptcy Act, but because equity would clearly demand it.

Id. at 93.

"The whole purpose of the bankruptcy system is to make the bankrupt's property available to his creditor and give back any surplus to him." 3A *Collier on Bankruptcy* ¶66.03 at 2327, n.8 (14th ed. 1971). Accordingly, cases have consistently held that under general equity principles, surplus monies held by the trustee and remaining unclaimed after the payment of all properly filed claims and costs of administration should be returned to the bankrupt. *See, e.g., Hendrie v. Lowmaster*, 152 F.2d 83, 85 (6th Cir. 1945); *Wheeling Structural Steel Co. v. Moss*, 62, F.2d 37, 40 (4th Cir. 1932); *Berl v. Crutcher*, 60 F.2d at 444; *In re Silk*, 55 F.2d 917, 918 (2nd Cir. 1932); *Johnson v. Norris*, 190 F.459, 462 (5th Cir. 1911); *cert. denied* 232 U.S. 723, 34 S.Ct. 479, 58 L.Ed. 815 (1914); *see generally*, 6 Remington, *Bankruptcy Law*, §2890 (5th ed. 1952). "[I]f the bankrupt is a corporation and its corporate existence has been terminated, the [c]ourt, in the exercise of its equity jurisdiction, may provide for such surplus to be distributed to its stockholders." *Hendrie v. Lowmaster*, 152 F.2d at 85 *citing Berl v. Crutcher* and *Johnson v. Norris*.

In the performance of its duty to turn the surplus over to the bankrupt, it was necessary for the bankruptcy court to determine who were the stockholders. The judge was faced with the request that the residual assets of the Estate be turned over to a temporary receiver, who was appointed by a state court to serve as a representative of the stockholders of the defunct corpo-

ration. Only after an extensive hearing on the matter, whereby the bankruptcy court permitted the trustee to demonstrate why he should not be required to surrender the assets to the temporary receiver, and only after examining the authority and qualifications of James J. Zito to act as temporary receiver, did the bankruptcy judge direct the trustee to surrender the residual assets of the estate to the temporary receiver. Such action was well within the bankruptcy court's jurisdiction and was a proper exercise of the bankruptcy judge's discretion.

Appellant contends, however, that a bankruptcy court is not authorized to appoint a receiver for a corporation, once all proceedings under the bankruptcy act are terminated. This contention is without merit. As stated by this circuit in *Berl:*

> Except by necessary implication, the Bankruptcy Act makes no provision for the disposal of a surplus of the property surrendered remaining after payment of the costs of administration and all creditors in full, but in the exercise of its equity jurisdiction it is the duty of the court to return it to the bankrupt. *Johnson v. Norris* (C.C.A.) 190 F.459, L.R.A. 1915B, 884. As this is a part of the administration of the bankrupt's estate, the returning of the surplus is a proceeding in bankruptcy.

60 F.2d at 444.

The propriety of appointing receivers and fashioning equitable solutions to instances where a surplus exists after payment of all debts and expenses was also recognized by the court in *Berl:*

> In the performance of its duty to turn the surplus over to the bankrupt, it was necessary for the Dis-

> trict Court to determine who are the stockholders. The propriety of appointing a receiver to hold that surplus in the interim is apparent. In the exercise of their equity jurisdiction, courts of bankruptcy may appoint special masters to facilitate the trial of issues before them. *In re Lacov* (C.C.A.) 134 F.237. There could be no doubt that the appointment of a master was necessary in this case, as neither the trustee nor the referee would be vested with jurisdiction to determine the ownership of the stock by virtue of their respective offices. Whether the corporation is to be continued or the surplus distributed to the stockholders is a matter to be decided in the future. With that we have no concern on this appeal.

Id.

The fact that the temporary receiver was appointed by a state court does not diminish the bankruptcy judge's broad equitable authority to adopt and recognize the temporary receiver as the proper representative of the defunct corporation, to whom the residual assets should be turned over. Bankruptcy does not of itself destroy the jurisdiction of state courts. It is competent for the court of bankruptcy to permit administration to go on in them. *Ex parte Baldwin*, 291 U.S. 610, 54 S.Ct. 551, 78 L.Ed. 1020; *Connell v. Walker*, 291 U.S. 1, 54 S.Ct. 257, 78 L.Ed. 613. It is usual and proper for federal courts to defer to prior state court proceedings to the extent of relinquishing jurisdiction to them, especially where the suits, like those dealt with in this proceeding, are brought by a state in respect of its fiscal affairs. *Pennsylvania v. Williams*, 294 U.S. 176, 55 S.Ct. 380, 79 L.Ed. 841, 96 A.L.R. 1166; *Penn General Gas*

Co. v. Pennsylvania, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850.

Furthermore, this court finds no danger of conflict in the bankruptcy court's Order. Such a conflict would exist and be inappropriate if the Temporary Receiver and the trustee, both allegedly acting in the interests of creditors and as officers of the court, were permitted to quarrel over the administration of the Estate. The prospect of such a dispute in the case of *In re Empire Finance Corp.*, 1 F.Supp. 298 (N.D. Cal. 1932), was undoubtedly the reason for the court's holding that the bankruptcy court had no general equity power to appoint a receiver who would oppose certain facets of the trustee's administration.

In this case, however, although not officially discharged, the trustee's responsibilities to administer the Estate have virtually come to an end. All of the creditors and administrative expenses have been paid in full. The trustee has filed his Final Accounting and Report representing that the Estate had been fully administered and all debts paid. Thus, the only thing remaining is the residual assets, which all parties agree should be returned to the bankrupt. Once the bankruptcy court exercised jurisdiction over the remaining assets and, in its effort to return the property to the bankrupt, ordered the residual assets turned over to the Temporary Receiver, the Estate closed, and the trustee discharged, the trustee's responsibilities in this matter terminated. Hence, there exists no possibility of conflict as contemplated by *In re Empire* that would preclude the bankruptcy judge from exercising his equity powers.

Again, all parties in this matter agree that the residual assets should be returned to the bankrupt. The only question remaining is who is the proper party to represent the bankrupt corporation. The corporation had been inactive for a period in excess of ten years. A review of LA.REV.STAT.ANN. §12:151(A)(2) (West) makes it clear that a state court has jurisdiction to appoint a receiver to take charge of the corporation's property when it is found that said property had been abandoned, or that the shareholders had failed to elect directors, or that there was no known authority to take charge of the corporation's affairs.

American Benefit sought and obtained a receivership pursuant to state law and then petitioned that the Estate be closed and the residual assets be turned over to that receiver for disposition in accordance with law.

The trustee's position is that if it was necessary to appoint a receiver, then a receiver should have been appointed by a federal district court. In fact, the trustee has outstanding an application to this court for the appointment of a federal receiver. Thus far, this court has declined to act upon said request until the matter concerning the appointment of the state court receiver is resolved. This court has no quarrel with the fact that a federal receiver could have been appointed, *see, e.g., Berl v. Crutcher*, 60 F.2d at 440, but finds that this was not the exclusive method of resolving the matter. It is the opinion of this court that a state court receivership provides an equally permissible course of action, especially in a case such as this, where the administration of the estate

has been unnecessarily prolonged. A major purpose of the bankruptcy law is to subject the administration of the estates of bankrupts to the control of tribunals charged with the responsibility of proceeding to final settlement and distribution in an efficient and speedy manner. Parties involved are entitled to have this authority exercised, and justly may complain when, as here, the remaining part of the administration is sought to be effected through the slower and less appropriate process of the appointment of a receiver by this court, that until now has had no connection with this case.

First Colonial was adjudged bankrupt on September 8, 1970, well over eleven (11) years ago. Justice requires that this matter be brought to a speedy conclusion. The Court has concluded that the nature of the appeal at bar indicates the desirability, if not the necessity, of the bankruptcy judge bringing this matter to a rapid determination by handing the residual assets over to the Temporary Receiver. *In re Pennsylvania Central Brewing Co.*, 135 F.2d 60 (3rd Cir. 1943).

The primary purpose of the Bankruptcy Act is to equitably, promptly, and economically collect the bankrupt's assets, convert them into cash and distribute them among creditors, and then to permit the bankrupt to start afresh free from obligations and responsibilities consequent upon business misfortune. *Ritholz v. Indiana State Board of Registration*, 45 F.Supp. 423 (N.D. Ind. 1942). The bankruptcy judge, acting within the spirit of the Act, attempted to bring this matter to a close by exercising his broad, equitable, discretionary powers and ordering the trustee to turn over the re-

sidual assets to the temporary receiver, close the Estate, and terminate his responsibilities as trustee. This court, sitting as a review court, finds that the bankruptcy judge's Order was well within his discretion, and such Order did not manifest clear error so as to warrant reversal. Consequently, the bankruptcy judge's finding and determination of February 3, 1981 must be affirmed.

RECUSAL

The issue of recusal is for the first time being urged by the trustee in his appeal. The question of whether the bankruptcy judge should have recused himself below, for whatever reason, had not been raised before the lower court. Consequently, this court need not entertain the merits of this contention.

The question of recusal is governed by 28 U.S.C. §144, which provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Notwithstanding the above provisions, the trustee cannot at this stage of the proceedings raise the issue of recusal when not one word was written or spoken regarding recusal during the proceedings below. This is especially true since Judge Posner appointed Baddock as trustee of the estate and the trustee served under his direction for more than ten years and no mention was ever made of recusal. The issue was not raised, no evidence was entertained concerning the matter, and no opportunity was given to make a record. The trustee cannot now ask this court, sitting as a reviewing court, to enforce 28 U.S.C.A. §455(a) and Bankruptcy Rule 505(b)(2) without any basis for doing so appearing in the record. The Fifth Circuit recently reiterated the necessity of timeliness in *Weber v. Coney*, 642 F.2d 91 (5th Cir. 1981):

> Ms. Weber's complaint to us that Judge Black should have disqualified himself in the case is wide of the mark in several respects. It is untimely because she filed the motion to disqualify about one year after the case was assigned to Judge Black, about four months after the case was transferred to Judge Gibson, and three days after Judge Gibson rendered a final judgment. *See* 28 U.S.C. §144.

Accordingly, this court determines that trustee, having failed to raise the issue of recusal in the proceedings below, is estopped from raising that issue in these appellant proceedings.

The decree below will be affirmed.

New Orleans, Louisiana, this the 4th day of March, 1982.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

MINUTE ENTRY
MARCH 3, 1982
COLLINS, J.

IN RE: FIRST COLONIAL CORPORATION OF AMERICA,
Bankrupt

CIVIL ACTION

NO. 81-694

SECTION "C"

MARCH 10, 1982

* * * * * * * * * * * * * * * *

This matter is before the court on American Benefit Life Insurance Company's Motion to Disqualify Judge filed January 20, 1982.

Counsel for both parties in this matter have represented to the court that they have no objections to this court ruling on the aforementioned Motion, since the alleged acts that form the basis for such Motion are that of the Judge's law clerk, and not of the Judge. Additionally, counsel have waived a hearing on this matter and have agreed that disposition of the Motion should be based upon the Motion itself, the Trustee's response to the Motion, and affidavits and memoranda filed by the parties. Accordingly,

IT IS HEREBY ORDERED AND ADJUDGED that the Motion to Disqualify filed by American Benefit Life Insurance Company is DENIED.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

REASONS

Pursuant to 28 U.S.C.A. §455(a) and 28 U.S.C.A. §144, American Benefit Life Insurance Company has submitted the present motion for disqualification. As argued by opposing counsel, and this court agrees, the case law interpreting the above statutory provisions require that disqualification of a judge be predicated on the inappropriate actions of such judge, as opposed to the inappropriate actions of his law clerk.

In this instance, the movant has raised the issue of my disqualification because of alleged comments made by one of my law clerks. The motion with its supporting affidavits and memorandum make plain that the complaint is lodged against my law clerk, and the only purpose of the motion is to determine whether my law clerk's alleged misconduct was authorized by me or in any way reflected my thoughts and position about this case:

> American Benefit further alleges that Mr. Williams has a bias and/or prejudice towards American Benefit . . . and accordingly, a hearing should be held to determine whether his spoken words express the views of Judge Collins.

Motion to Disqualify Judge at p. 3.

> In support of this motion, we have attached and submitted the affidavit of American Benefit Life Insurance Company . . . stating that the motion is made in good faith and so as to determine if the spoken words and representations of Charlester Williams express the views of Judge Robert F. Collins.

Memorandum in support of Motion to Disqualify Judge at p. 1.

The alleged misconduct of my law clerk, if true, was unauthorized and not sanctioned by this court. Moreover, the law clerk's alleged misconduct does not reflect any bias or prejudice shared by this court with regard to any party in this matter, nor does it affect the court's ability to render a fair and impartial decision.

The alleged mistatements of my law clerk arose out of an over-zealous attempt to expedite the disposition of this case, a matter which all parties agree has been unnecessarily prolonged. Although opposing counsel found nothing wrong in my law clerk's attempt to unravel the procedural haze that exists in this matter and expeditiously conclude the case, counsel for American Benefit filed this motion because of alleged mistatements made by the clerk during such attempts. In any event, assuming that the alleged mistatements were made, such mistatements were a product of an attempt to clarify the issues between the parties, that would have hopefully enabled this matter to come to a speedier conclusion. The alleged mistatements in no way addressed or concerned the merits of this case. Consequently, such mistatements do not indicate any bias or prejudice shared by my law clerk or this court with respect to any party in this case, nor does it affect this court's ability to render a fair and impartial decision in this matter.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF
FIRST COLONIAL CORPORATION OF AMERICA

NO. 81-694

SECTION "C"

MARCH 31, 1982

* * * * * * * * * * * * * * *

JUDGMENT

This matter came on for hearing on March 25, 1981. Franz Joseph Baddock, Trustee for First Colonial Corporation of America, appeared as appellant. Floyd J. Falcon, Jr. appeared for American Benefit Life Insurance Company, appellee. The Court, after considering the law, the evidence, and the entire record, and further after considering the briefs submitted by the respective parties, is of the opinion that the decree below should be affirmed, and accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment rendered by the Honorable Harvey H. Posner, Bankruptcy Judge for the Bankruptcy Court of the Middle District of Louisiana on December 3, 1980, is affirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the cash and noncash assets which were turned over to the Clerk of the United States District Court for the Eastern District of Louisiana for deposit and investment as per the instructions of the Court by Order dated March 27, 1981, be delivered to James J.

Zito, Temporary Receiver for First Colonial Corporation of America.

New Orleans, Louisiana, this the 29th day of March, 1982.

/s/ ROBERT F. COLLINS
UNITED STATES
DISTRICT JUDGE

B-7627, 3-83, 50

CERTIFICATE OF SERVICE

I certify under Rule 28.5. that I have this date, by prepaid mail, forwarded three (3) copies of the foregoing Supplemental Appendix to MR. FLOYD J. FALCON, JR., Attorney, Avant & Falcon, P. O. Box 2667, Baton Rouge, Louisiana 70821, who is counsel of record for American Benefit Life Insurance Company, as required by Rule 28.3.

I further certify under Rule 28.5. that all parties to this proceeding required to be served have thus been served, and that other than AMERICAN BENEFIT LIFE INSURANCE COMPANY AND PETITIONER, there are no other parties to this proceeding.

BATON ROUGE, Louisiana, March 30, 1983.

/s/ FRANZ JOSEPH BADDOCK